UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION
----------x

In re:

PAUL ALBERT,

Debtor.

Chapter 7
Case No.: 99-31520
Hon. Cecelia G. Morris

----------X

NORMAN GOLDSTEIN, NORMAN GOLDSTEIN ASSOCIATES, INC., MARCY GOLDSTEIN, DAVID HARRIS, GEORGE SCHNEIDER, MARIA BINKOWSKI, LESZEK MEJER, and HENRIETTA GOLDSTEIN,

Plaintiffs,

-v-

PAUL ALBERT,

Defendant.

Adv. Proc. No.: 99-7108

----------X

MEMORANDUM DECISION DENYING STAY PENDING APPEAL PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 8005

A P P E A R A N C E S :

Goodman & Saperstein, Esqs.

Attorneys for the Plaintiffs
666 Old Country Road, Suite 406
Garden City, New York 11530
Martin I. Saperstein, Esq.
Of Counsel

CECELIA G. MORRIS
UNITED STATES BANKRUPTCY JUDGE

On June 18, 2002, Martin I. Saperstein, of the Law Offices of Goodman & Saperstein, argued a motion for a stay pending appeal of this Court's March 21, 2002 decision which denied Goodman and Saperstein's motion to be relieved as counsel to the plaintiffs. The Law Offices of Goodman & Saperstein (hereinafter, "Goodman") have represented the plaintiffs involved in the instant adversary proceeding (See Case No. 99-7108) and the underlying related state court matter since 1986. A hearing denying Goodman's motion for withdrawal as plaintiff's counsel was held on May 5, 2002. This Court issued an oral ruling and a written decision, published on March 21, 2002. (See Case No. 99-7108, Docket Entry #81, Decision and Order). Goodman's motion was denied.

Movant's request for a stay pending appeal must fail, since, *inter alia*, Movant has not satisfactorily met the standard for a stay pursuant to Federal Rule of Bankruptcy Procedure 8005.

I. Background

On June 2, 1999, Paul Albert filed a voluntary petition for Chapter 7 bankruptcy. On October 7, 1999, an adversary proceeding was commenced against Debtor Paul Albert by plaintiffs Norman Goldstein, Norman Goldstein Associates, Inc., Marcy Goldstein, David Harris, George Schneider, Maria Binkowski, Leszek Mejer, and Henrietta Goldstein

(collectively "Plaintiffs"). Plaintiffs seek a determination by this Court that certain debts Albert allegedly owes to the Plaintiffs should be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6). In connection with this non-dischargeability action, and the related underlying state court matter, Plaintiff's attorney, Stanley Goodman, Esq. of the Law Offices of Goodman & Saperstein ("Goodman") has represented the Plaintiffs since 1986. On November 9, 1999, Defendant Debtor Paul Albert filed an Answer through his attorney at the time, Neil R. Flaum, Esq.

Since the commencement of the adversary proceeding, the parties have engaged in complex motion practice dealing with, *inter alia*, issues of collateral estoppel. The most recent motions resulted in a lengthy decision by this Court denying summary judgment. (The parties have also discussed with this Court the potential for further extensive dispositive motions in advance of trial). Specifically, on April 18, 2000, Plaintiffs through their counsel filed a Motion for Summary Judgment. Then, on September 18, 2000, Debtor Defendant entered opposition to Plaintiff's motion, and filed a separate Motion to Dismiss and Summary Judgment. On November 14, 2000, further briefing on the motions occurred. On January 23, 2001, the parties were allowed to amend their respective motions. On February 28, 2001 Plaintiffs through their attorneys filed amended submissions in opposition to Debtor Defendant's motions. On August 13, 2001, this Court denied Plaintiff's Summary Judgment on the second cause of action.

On March 5, 2002, Stanley Goodman sought to withdraw from representation of the Plaintiffs. Goodman filed a Notice of Motion and Application dated January 14, 2002, for permission to withdraw as counsel to the Plaintiffs. Due to repeated non-compliance with this Court's electronic case filing requirements, Goodman did not file these papers himself; rather, he had Debtor Defendant's substitute counsel, Avrum Rosen, Esq. file them on his behalf.

Goodman's original motion dated January 14, 2002 was deficient in several respects and he was permitted to submit an amended motion. For example, the January 14, 2002 motion papers lacked citation to any legal standard and did not include a memorandum of law as required by Bankruptcy Court local rule. S.D.N.Y. LBR 9013-1(b) ("failure to comply with this subdivision may be deemed sufficient cause for the denial of the motion or the granting of the motion by default.)

Goodman then filed an Amended Notice of Motion and Amended Application dated February 25, 2002. Again, through Goodman's non-compliance with the Southern District of New York Bankruptcy Court's electronic case filing requirements, Goodman had opposing counsel file motion papers on his behalf.

The application to withdraw was heard by this Court on March 5, 2002. The Law Offices of Goodman & Saperstein, appeared by Stanley R. Goodman, Esq. counsel for the Plaintiffs. One of the named Plaintiffs, Norman Goldstein ("Goldstein"), appeared *pro se* in opposition to his attorney's motion.

As set forth on the record on March 5, 2002 and in a subsequent decision by this Court issued on March 21, 2002, Goodman's application to withdraw as counsel was denied. Goodman then appealed this Court's decision to the District Court. On June 18, 2002, Martin I. Saperstein, Esq., of the Law Firm of Goodman & Saperstein, sought a stay of the adversary proceeding while the denial of his withdrawal motion is on appeal.

II. Discussion

The standards for the grant of a stay pending appeal are the same as those governing the grant of an injunction. Sandra Cotton, Inc. v. Bank of New York, 64 B.R. 262, 263

(Bankr. W.D.N.Y. 1986), *appeal dismissed*, 87 B.R. 272: (W.D.N.Y. 1988), In re Liggett, 118 B.R. 219, 221: (Bankr. S.D.N.Y. 1990). The stay pending appeal sought in this matter is discretionary. *See* In re Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49 (S.D.N.Y. 1988). Federal Rule of Bankruptcy Procedure 8005 governs motions to stay pending appeal of bankruptcy court orders. Rule 8005 permits such a motion to be made when (1) the motion is presented to the bankruptcy judge in the first instance, and (2) the motion may be made to district court if it demonstrates why the stay was not obtained from the bankruptcy judge. Id., In re Harry Alexander, 248 B.R. 478 (S.D.N.Y. 2000); In re Zahn Farms, 206 B.R. 643 (2d Cir. BAP 1997); COLLIERS ON BANKRUPTCY ¶ 8005.10 (15th Ed. Rev.).

The party seeking a stay pending appeal under Rule 8005 must satisfy the four criteria required for issuance of a preliminary injunction. In Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir. 1992), the Court of Appeals established a four part test for determining whether to grant a motion for stay pending appeal: (1) a 'substantial possibility of success' on appeal; (2) whether the movant will suffer irreparable injury if the stay is denied; (3) whether substantial harm will be suffered by other parties if the stay is granted; and, (4) the harm to the public interest, if implicated. Id; In re Frankel, 192 B.R. 623; Green Point Bank v. Treston, 188 B.R. 9, 11 (S.D.N.Y. 1995); In re Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49 (S.D.N.Y. 1988); In re Advanced Mining Systems, Inc., 173 B.R. 467, 468 (S.D.N.Y. 1994); In re de Kleinman, 150 B.R. 524, 528 (Bankr. S.D.N.Y. 1992); In re Liggett, 118 B.R. 219, 221 (Bankr. S.D.N.Y. 1990); In re Country Squire Assocs., 203 B.R. 182 (2d Cir. BAP 1996); In re Peter Bogdanovich, Civ. 00-2266(JGK), 2000 U.S. Dist. LEXIS16501 (S.D.N.Y. Nov. 14, 2000).

All four criteria must be satisfied by the movant before relief under Rule 8005 can be granted. Id. Movant must show "satisfactory" evidence on all four criteria. Id.; In re

Bijan-Sara Corp., 203 B.R. 358, 360 (B.A.P. 2d Cir. 1996). Failure to satisfy one prong of this standard for granting a stay will result in denial of the motion. In re Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49 (S.D.N.Y. 1988); In re Bijan-Sara Corp., 203 B.R. 358, 360 (2d Cir. BAP 1996); Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir. 1992); In re Turner, 207 B.R. 373 (2d Cir. BAP 1997).

A. A 'Substantial Possibility of Success' on Appeal

Movant has not presented a substantial possibility of success on appeal because Movant's grounds for withdrawal as counsel lacked merit, and movant failed to substantiate those grounds with evidence.

i. Standard

The Hirschfeld test requires that the movant demonstrate a "substantial possibility" of success on appeal. In re Turner, 207 B.R. 373. Although "substantial possibility of success" has not been specifically defined in this Circuit, it is noteworthy that Hirschfeld took a middle approach between the more rigorous requirement of "likelihood of success on appeal" and the more relaxed standard of mere "possibility of a successful appeal." Id. This intermediate level between probable and possible success reflects the Court of Appeal's intent to restrict appellate review to those parties with colorable claims while at the same time conserving judicial resources by eliminating frivolous appeals. Id.

ii. Goodman's Grounds for Withdrawal as Counsel:

In denying Goodman's motion to withdraw as counsel to the plaintiffs in this adversary proceeding, this Court found that Goodman's grounds lacked merit and were unsubstantiated. At the hearing on March 5, 2002, Goodman set forth the following grounds for withdrawal, as follows:

First, Goodman stated that Plaintiffs have failed to pay legal fees. Though the disputed bills were not produced with the motion or at oral argument, Goodman stated that there exist unpaid legal fees in the approximate amount of $5,000 going as far back as six to eight months. (Goodman's Amended Motion, paragraph 19). Tape 2098, Count 5958-5968. Goldstein responded that the exact amount of the outstanding bill is in dispute. Goldstein argued that the amount owed is closer to $4,800. In addition, an ongoing dispute about fees arose regarding Goldstein's payment of legal fees on behalf of George Schneider, one of the plaintiffs in the adversary. Tape 2098, Count 6440-6444. Goldstein has no familial relationship to this plaintiff, and testified that he never agreed to pay for Schneider's share. Tape 2098, Count 6460-6470. When Goldstein asked if this plaintiff could be taken out of the case, Goodman told him that such action was not possible. According to Goldstein, he has been billed for Schneider's share.

Further, according to both Goodman and Goldstein, their attorney client relationship is governed and defined by an oral retainer agreement, and yet documentary evidence of frequency of billing and payment was not provided to this court by Goodman. Goodman never provided such evidence. Goodman misplaces emphasis on this Court's finding that there was an oral retainer between the parties. Goodman seems to argue that the Court denied his motion solely because of the existence of the oral retainer. The Court, however, denied the motion because Goodman, as movant, failed to adequately produce evidence as to the grounds of the withdrawal motion.

In fact, based on the evidence presented to this Court at the March 5th hearing, Goldstein has not deliberately disregarded the fee agreement. Goldstein testified at the hearing that he agreed at a recent meeting that he intends to and will pay the outstanding bill. By acknowledging that the outstanding bill exists and that it will be paid, Goldstein recognizes that the fee agreement is still in effect. No evidence to the contrary was

presented to the Court.

A number of courts have held that nonpayment of fees alone is insufficient cause for the withdrawal of counsel. In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990); Colter v. Edsall (In re Edsall), 89 Bankr. 772 (Bankr. N.D. Ind. 1988); In re Pair, 77 B.R. 976 (Bankr. N.D.Ga. 1987); Kriegsman v. Kriegsman, 150 N.J. Super. 474, 375 A.2d 1253 (App. Div. 1977).

That Goodman has not received prompt payment for legal services is not grounds for permitting withdrawal. In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990). An attorney who undertakes to represent a client assumes obligations towards his client which are not excused merely because the client is unable to pay fees demanded by the attorney. In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990); Pair, 77 B.R. at 978, citing, Kriegsman v. Kriegsman, 150 N.J. Super. 474, 375 A.2d 1253. A motion for withdrawal made by an attorney who has not received full payment may be denied where this will not impose an unreasonable financial burden. In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990); Edsall, 89 B.R. at 776.

Cause for withdrawal has been found, however, where in addition to nonpayment of fees, counsel has been the object of hostile conduct by the client, Holmes v. Y.J.A. Realty Corp., 128 A.D.2d 482, 513 N.Y.S.2d 415 (1st Dep't 1987), where the attorney-client relationship has become unproductive, Kolomick v. Kolomick, 133 A.D.2d 69, 518 N.Y.S.2d 413 (2d Dep't 1987), and where there has been a breach of trust on the part of the client or a challenge to the attorney's loyalty. Hunkins v. Lake Placid Vacation Corp., 120 A.D.2d 199, 508 N.Y.S.2d 335 (3d Dep't 1986). In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990).

This Court found that there had been no allegation that counsel has been the object of hostile conduct by the client, nor, that there has been a breach of trust on the part of the client or a challenge to the attorney's loyalty, nor has there been any credible proof that the attorney-client relationship has become unproductive. Cross-examination of the client in open court, however, could lead to hostile conduct by the client toward Goodman, especially since Goodman blatantly misstated his client's testimony at the hearing.

Second, Goodman stated that the last payment from the Goldstein entities was received eight months ago, and that the Goldstein entities have refused to make any payments for past or future legal work. (Goodman's Amended Motion, paragraph 19). Tape 2098, Count 5958-5964. However, besides the fact that there is an ongoing dispute over fees, Goldstein testified that although he currently has an inability to repay, he has promised Goodman that he will eventually be paid in the future. Tape 2098, Count 6537-6558. The downturn in the economy has caused Goldstein's corporation, Norman Goldstein Associates, Inc. , to suffer substantial losses. Money is currently "tight" for Goldstein. Goldstein has already paid over $60,000 in legal fees to Goodman and Saperstein in connection with the adversary proceeding. Tape 2098, Count 6537-6558. With the exception of this last bill, Goldstein was current in his payments, making regular payments. Tape 2098, Count 6537-6558. Goldstein stated on the record that he has never failed to pay anyone in his life and that Goodman will be paid. Tape 2098, Count 6537-6558.

In addition, according to Goldstein, Goodman promised Goldstein, on several occasions that no additional fees would be incurred in connection with the adversary proceeding. Not surprisingly, Goldstein continued to receive bills for legal services as work continued on. Tape 2098, Count 6508-6529.

Some of the work that Goldstein was billed for was never actually used in the case. A great deal of work was done on "special research" in excess of $6,000 that was never actually incorporated into work product on the case. Tape 2098, Count 6474-6508.

According to Goldstein, Goodman promised certain legal outcomes that never materialized. Over time, Goldstein became more and more frustrated with Goodman's legal work, which caused him to make comments that he was not going to pay for any additional work. At the hearing however, Goldstein explained that pursuant to recent discussions with Goodman, he acknowledged the importance of Goodman's representation of his interests in the adversary proceeding, and promised to pay Goodman the future. There was no indication of a hostile relationship between Goodman and Goldstein.

Third, Goodman stated that Plaintiffs have refused to pay for both past and future work. (Goodman's Amended Motion, paragraph 19). Tape 2098, Count 6143-6144. Goldstein asserted that he did not refuse to pay; he currently has an inability to pay but has promised eventual future payment. Tape 2098, Count 6822-6838. In addition, there are outstanding issues between the attorney and the Goldstein entities regarding payment: Goldstein testified that he did not make payments because 1. he was repeatedly promised that no additional legal fees would be incurred; 2. discussions were ongoing on some of the issues in the case; and 3. Goldstein does not have the current ability to pay. Tape 2098, Count 6933-6980.

Fourth, Goodman stated that at this point in time, the Plaintiffs would not be prejudiced by the substitution of counsel because the case is in its early stages and there would be no delay. As a result, he urged, new trial counsel could start fresh with discovery in preparation for trial. (Goodman's Amended Motion, paragraph 20). Tape 2098, Count

6000-6010. However, the possibility exists, as already discussed by the parties, of the need for additional pre-trial dispositive motions. Also, Goldstein would incur additional costs and delay if forced to retain new counsel, who would of course need to expend extra time becoming acquainted with the case.

Further, Goldstein feels that the matter is too complicated for him to adequately represent himself *pro se*. Further, Goldstein would have to retain new counsel if only to represent plaintiff Norman Goldstein Associates, Inc. In addition, Goldstein feels that there would be a steep learning curve for new counsel that Goodman does not currently face, since he is so well-acquainted with the adversary proceeding already and has been involved in the Albert litigation for approximately six years. Tape 2098, Count 6730-6916. Also, Goldstein asserts that Goodman's attempt at withdrawal damaged any prospect of the two parties reaching a resolution in this case. Prior to the motion, Goldstein was actively negotiating with defendant Paul Albert. Once the motion was filed, Goldstein asserts that settlement negotiations ended and Albert lost interest in settling the matter. Tape 2098, Count 6590-6630.

Fifth, Goodman stated that taking the case to trial would be an extreme burden without any hope of recompense for past or future work. (Goodman's Amended Motion, paragraph 20). Tape 2098, Count 6180. Goodman is owed between $4800-$5000 dollars, but has already been paid in excess of $60,000 for work on the adversary proceeding. Thus, Goodman is currently owed less than ten percent of what he has been paid. This attorney-client relationship has been ongoing since 1986, and up to this point, regular payments have been made. Goldstein testified that he would eventually repay Goodman. Tape 2098, Count 6822-6838.

Sixth, Goodman stated that at a recent face-to-face meeting, Goldstein reiterated that he

was not going to pay any more legal fees in this matter. No payment was made on account of the outstanding statement. (Goodman's Amended Motion, paragraph 22). In a conversation between the parties two weeks prior to the hearing, Goldstein informed Goodman that he did not have the current financial ability to repay because of the poor economy, but intends to the pay. Tape 2098, Count 6822-6838.

Seventh, Goodman stated that the Goldstein entities have the ability to pay but no intent to repay, and because the Plaintiffs are not debtors they are not insolvent. (Goodman's Amended Motion, paragraphs 23, 25 and 26) Tape 2098, Count 5970. Goodman further stated that the Goldstein entities have the ability to pay legal fees, but have instead seen fit to deliberately repudiate their agreement with Goodman and Saperstein and have disregarded their obligation with respect to past due legal fees. (See Goodman's Amended Motion, paragraph 26.) As outlined in the preceding paragraphs, Goldstein testified that in a conversation two weeks before the hearing he told Goodman he did not have the current financial ability to repay, but did intend to pay. Tape 2098, Count 6822-6838.

Eighth, Goodman stated that the attorney-client relationship has declined to the point where Goodman & Saperstein can no longer serve the Plaintiffs' needs in this case due to non-payment. Tape 2098, Count 5987-5997. Goldstein testified that he wants Goodman and Saperstein to continue to represent the Plaintiffs and that payment would be made. Cross examination in open court could have had the negative impact of degenerating the attorney -client relationship to the point where Goldstein would not even have the option of having Goodman represent him in the adversary proceeding, because the attorney and client would not be able to work together any longer in a productive manner.

In sum, this Court finds that a substantial probability of success on the merits does not

exist. Nonpayment of fees alone is not sufficient grounds for withdrawal under the legal standards set forth in Court's March 21st written decision, and the movant failed to show any grounds beyond nonpayment of fees to bolster his motion.

B. Whether the Movant Will Suffer Irreparable Injury if the Stay is Denied

This Court does not believe that Goodman will suffer irreparable injury if the stay pending appeal is denied.1 First, Goodman will most likely receive payment for his services. It should be noted that Goodman has already been paid $60,000 in connection with this matter. At the March 5th hearing, Goldstein stated on the record, numerous times, in fact, that he intended to pay for both past and future work, and that he wanted Goodman to continue representing the plaintiffs in the adversary proceeding. Thus, it is likely that Goodman will receive payment for his services.

Goodman cites to the Second Circuit opinion, Whiting v. Lacara, 187 F.3d 317 (Second Circuit, 1999) for the proposition that counsel forced to continue to represent a client against his will would suffer irreparable injury *absent a stay.* See Movant's Memorandum of Law, page 17. In the case, Whiting v. Lacara, however, the Second Circuit was discussing the collateral order doctrine, which "is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." See Whiting, 187 F.3d at 319, citing Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430-31, 105 S.Ct. 2757, 86 L. Ed. 2d 340 (1985).

The issue at hand is not whether the trial court order is immediately appealable. No one disputes that this Court's order denying Mr. Goodman's motion to withdraw as counsel is immediately appealable to the District Court. In fact, it is on appeal now. No one contests

1 Goodman's motion to be relieved as counsel was denied at a hearing held on March 5, 2002. Goodman waited almost four months to file his motion to stay the adversary proceeding. The motion was filed on May 28, 2002. The court has a hard time finding irreparable harm, where movant waited so long to file the stay motion. His involvement in the case could not have been very detrimental to himself or his firm.

that the denial of a stay in this adversary proceeding is also appealable. The "irreparable injury" standard discussed in Whiting v. Lacara was an element of the collateral order doctrine, not the same element that must be considered in connection with a stay pursuant to Federal Rule of Bankruptcy Procedure 8005. In fact, the Second Circuit, in the same opinion, noted that a district court's denial of a motion to withdraw is reviewed only for abuse of discretion. *See, e.g.* *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir.1994); *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir.1982).

The Second Circuit further noted that:

> District courts are due considerable deference in decisions not to grant a motion for an attorney's withdrawal. *See, e.g., Washington,* 694 F.2d at 1087. The trial judge is closest to the parties and the facts, and we are very reluctant to interfere with district judges' management of their very busy dockets. Id.at 320.

Assuming, *arguendo,* that the same standard for "irreparable harm" applies to both the stay and collateral order doctrine, Movant has still failed to satisfy all four prongs of the Hirschfeld test. Movant must show "satisfactory" evidence on all four criteria. Id.; In re Bijan-Sara Corp., 203 B.R. 358, 360 (B.A.P. 2d Cir. 1996). Failure to satisfy one prong of this standard for granting a stay will result in denial of the motion. In re Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49 (S.D.N.Y. 1988); In re Bijan-Sara Corp., 203 B.R. 358, 360 (2d Cir. BAP 1996); Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir. 1992); In re Turner, 207 B.R. 373 (2d Cir. BAP 1997).

C. Whether Substantial Harm Will be Suffered by Other Parties if the Stay is Granted

In contrast, this Court believes that the plaintiffs in this case will suffer severe prejudice and delay if the adversary proceeding is stayed. This adversary proceeding was

commenced in October, 1999. The case has had numerous dispositive motions denied, and thus remains in the initial stages of discovery for trial, and the plaintiffs deserve progress on this case. Staying the proceeding will only add to the delay and frustration these plaintiffs have already faced.

On May 24, 2002, a scheduling order was signed in this case to aid in its progression and to prevent further delay. This Court does not believe that the entry of a scheduling order will affect the plaintiff's ability to secure new counsel, if the need arises. This Court entertains motions to amend scheduling orders on a routine basis. In addition, the scheduling order was drafted liberally in order to allow for sufficient discovery time. A sufficiently broad scope of time was given, so that discovery would proceed at a steady, yet unrushed, pace. The trial date is currently set for March of next year.

In sum, this Court cannot see irreparable harm occurring to Goodman. It is more likely that substantial prejudice and harm will occur to the plaintiffs if the case does not progress toward trial. The plaintiffs have already spent substantial time and money bringing the case to this point, and a resolution is necessary.

D. The Harm to the Public Interest, If Implicated

I conclude that no harm to the public interest will occur if a stay in this adversary proceeding is denied.

ii. Goodman's Reasons for why a Stay of the Adversary Proceeding Should be Granted:

Goodman asserts the following reasons for why a stay should be granted:

i. *That he was deprived of his right to cross examine Goldstein.* Goodman made a

request to cross examine Goldstein, a witness that the court called and swore in. Goodman's request was denied. Goodman asserts that he was deprived of his statutory and due process rights to cross examine Goldstein. Goodman fails to mention what precipitated his request to cross-examine Goldstein. See Transcript of Hearing, page 25. Goodman did not make his request to cross-examine Goldstein until after the Court had made its ruling on the motion. At that point, Goodman made a request to cross-examine, coupled with an inaccurate depiction of Goldstein's testimony that day in open court.

At the hearing, Mr. Goodman stated:

> Mr. Goodman: *Your Honor, may I persist one second. The sense that the client has affirmatively stated, that, regardless of the bill, that there's no intention to pay for any services rendered in connection with this case regardless of how competent –*
>
> The Court: *That was not the testimony today in this courtroom.*
>
> Mr. Goodman: *Oh, yes, he said that. He said that there's no intention.*
>
> The Court: *Mr. Goodman, I heard the testimony. That is not the testimony.*

Goodman falsely stated the testimony of Goldstein in court that day. Goldstein stated numerous times on the record and under oath that he had a willingness to pay both future and past legal fees.

Goldstein asserted that he did not refuse to pay; he currently has an inability to pay but has promised eventual future payment. Tape 2098, Count 6822-6838. Goldstein stated on

the record that he has never failed to pay anyone in his life and that Goodman would be paid. Tape 2098, Count 6537-6558. *Despite these statements made in open court that very same day*, Goodman claimed that Goldstein testified that he would not pay, regardless of the competent nature of Goodman's representation. Of course, that was clearly not Goldstein's testimony, and the Court was quite shocked by Goodman's misrepresentation of what had just been said by his client in open court.

Moreover, Goodman waited until after the Court had made a ruling to try to elicit testimony from Goldstein. No evidence had been forthcoming from Goodman before the Court's ruling, while the Court was actively examining the grounds to his motion.

The Court could sense that any cross-examination by Goodman at this point would have been counterproductive to the truth-finding process, since Goodman had already clearly misstated Goldstein's testimony on the record. In addition, the cross-examination had the grave potential of severely and irreparably damaging the attorney-client relationship. Any hope of Goodman's continued representation in the adversary would have been demolished by a fight with his client over the content of the client's testimony in open court. The cross-examination had the potential of creating a division that would prevent the continuance of a productive working relationship. To preserve the attorney-client relationship, and to avoid further misrepresentations of testimony at the hearing, the court made its ruling and denied Goodman's request for cross-examination.

As Goodman states, Goldstein did not file opposition papers to Goodman's motion, and Goodman was not 100% sure of what Goldstein would state in response to his motion at the hearing. This Court does not require pro se litigants, who are non-attorneys, to file opposition papers on a motion for a request by the attorney to withdraw as counsel. This would diminish the pro se litigant's entitlement to due process. The lack of opposition

papers does not relieve the movant of his burden of producing evidence to support the grounds to his motion. The lack of opposition papers did not serve as a license for Goodman to fail to prove his case by failing to bring to court billing and time records and other evidence of the retainer agreement. This evidence was necessary whether Goldstein appeared in court or not. It makes no difference that Goodman had no prior knowledge of what Goldstein's testimony would be. Further, Goodman himself was in the unique position of knowing exacting what his client would say. He was in contact with his client two weeks prior to the hearing, and the issue of fees was brought up and discussed. Goodman was aware that his client had paid an extraordinary amount in legal fees thus far, and continued to seek assistance from Goodman in resolving the matter once and for all. Goodman should have been able to fully anticipate that he would receive opposition to his motion from two of the plaintiffs, Goldstein, as an individual and as a representative of Norman Goldstein Associates, Inc.

ii. *Goodman did not have the ability to refute or rebut Goldstein's testimony regarding disputed factual issues.* The Court finds this argument interesting, especially since Goodman failed to clear the threshold burden of bringing evidence to court to substantiate the grounds for his motion to withdraw. Goodman failed to produce evidence regarding the terms of the retainer agreement. Goodman failed to produce evidence on the billing arrangement between himself and the client. Goodman never produced evidence on the exact amount of money owed. Goodman never produced evidence regarding the work he did on the matter.

Clearly, the movant who seeks relief has the burden of producing evidence on all of these issues. Courts give particular scrutiny to fee arrangements between attorneys and clients, "casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients." Shaw, 507

N.Y.S. 2d at 612. Goodman failed to adequately produce any evidence on exactly what the terms of this retainer are, even though he was the movant seeking relief. The Court had to resolve the issue in favor of the non-moving party.

Furthermore, Goodman failed to adequately produce any evidence that Goldstein had deliberately disregarded their agreement. A number of courts have held that nonpayment of fees alone is insufficient cause for the withdrawal of counsel. In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990); Colter v. Edsall (In re Edsall), 89 Bankr. 772 (Bankr. N.D. Ind. 1988); In re Pair, 77 B.R. 976 (Bankr. N.D.Ga. 1987); Kriegsman v. Kriegsman, 150 N.J. Super. 474, 375 A.2d 1253 (App. Div. 1977). Further, Goldstein testified that in a conversation between the parties two weeks prior to the hearing, Goldstein informed Goodman that he did not have the current financial ability to repay because of the poor economy, but intends to the pay. Tape 2098, Count 6822-6838. Thus, without evidence on the issue of a deliberate disregard for the agreement, the only option for the court was to rule in favor of Goldstein.

Thus, Goodman failed to bear his burden of production, and this Court denied his motion for its lack of both merit and substance.

III. Conclusion

This Court, in its judicial discretion, and for the reasons stated above, finds that a stay pending appeal is not warranted. Movant's request for a stay pending appeal pursuant to Rule 8005 is, hereby, DENIED in all respects.

ENTER:

Dated: June 20, 2002
Poughkeepsie, New York

/s/ Cecelia Morris
_____
Cecelia G. Morris
United States Bankruptcy Judge